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October 19, 2015

BY ECF

Hon. Daniel E. O'Toole
Circuit Executive and Clerk of Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW, Room 401
Washington, D.C. 20439

**RE: Response to Rule 28(j) Citation of Supplemental Authority in
Click-to-Call Technologies, LP v. Oracle Corp., Appeal No. 15-1242**

Dear Mr. O'Toole:

Appellee's reliance on *Achates Reference Publishing, Inc. v. Apple Inc.*, No. 2014-1767 (Sept. 30, 2015) fails to account for *Achates*' prescription of non-statutory judicial review of the Board's *ultra vires* actions and Click-to-Call's (CTC) pending petition for mandamus relief.

This Court recognized a party's ability to obtain judicial review when the Board violates a clear statutory mandate under the *Leedom v. Kyne*¹ exception. *See Achates*, at 13. Because *Achates* held that 35 U.S.C. § 314(d) prohibits this Court from reviewing the Board's decision regarding Section 315(b), CTC is wholly deprived of a meaningful and adequate means of vindicating its statutory right to be free from *inter partes* review. *See Hanauer v. Reich*, 82 F.3d 1304, 1309 (4th Cir. 1996). Thus, review is necessary because CTC has no statutory basis for direct review of the Board's decision to permit IPR in violation of Section 315(b).

In addition, where a statute is unambiguous, this Court can review the agency's action to determine if it violated a clear statutory mandate without resort to statutory interpretation. *See e.g., Dart v. U.S.*, 848 F.2d 217, 228-231 (D.C. Cir.

¹ 358 U.S. 184 (1958).



1988). As discussed in CTC's briefing, Reply Br. at 11, the Board failed to adhere to the plain terms of Section 315(b), which is Congress's final expression of its intent, *Dart*, 848 F.2d at 228. In doing so, the Board violated the clear statutory mandate by instituting review where the petitioner was served with a complaint alleging infringement of the patent more than one year prior to filing its petition. This *ultra vires* action warrants non-statutory review under the *Kyne* exception.

Alternatively, CTC petitioned for mandamus relief under 28 U.S.C. § 1651, relying on *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268 (Fed. Cir. 2015). This Court has not addressed CTC's petition, which also permits review should the Board deny non-statutory judicial review. Therefore, dismissal is not warranted because both of these avenues provide CTC judicial review.

Respectfully Submitted,

/s/ Peter J. Ayers

Peter J. Ayers



CERTIFICATE OF SERVICE

I certify that on October 19, 2015, I caused this Response to Rule 28(j) Citation of Supplemental Authority to be filed electronically with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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